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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Smithville Telephone Company, Inc.)
)
Petition for Waiver of the Section 54.301)
Local Switching Support Data Submission)
Reporting Date for an Average Schedule Company)

CC Docket No. 96-45

To: Chief, Wireline Competition Bureau

PETITION FOR WAIVER – EXPEDITED ACTION REQUESTED

Smithville Telephone Company, Inc. ("Smithville") pursuant to Section 1.3 of the Commission's Rules¹ hereby requests a waiver, to the extent necessary, of Sections 54.301(b) and (f) of the Commission's rules specifically with respect to the Local Switching Support ("LSS") submission date for projected data from an average schedule company.² As a result of an unexpected replacement at Smithville of the key management individuals following the death of its President and other changes in the staff over the last year, Smithville did not report projected average schedule data required to be submitted on October 1, 2003 pursuant to the Universal Service Administrative Company's ("USAC") requirements until February 10, 2004. This data is used by USAC to project and determine the calculation of Local Switching Support ("LSS") for average schedule carriers.

I. Background

USAC requires that cost study companies and average schedule companies submit projected

¹ 47 C.F.R. § 1.3.

² See 47 C.F.R. §54.301(b) and (f). See also n. 3, *infra*.

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information that allows USAC to calculate LSS amounts for inclusion in the Universal Service Fund program for a coming year.³ USAC requires incumbent local exchange carriers ("LECs") that have been designated an Eligible Telecommunications Carrier ("ETC") and serve 50,000 or fewer access lines within a study area to file LSS projections no later than October 1 of the year preceding the calendar year in which the LEC expects to receive LSS. For cost study companies, projected accounting data and cost information used in the calculation of LSS is submitted.⁴ For an average schedule company, data is submitted which is used as input to the average schedule formula(s) used to calculate LSS amounts.⁵ USAC has concluded that if an average schedule company does not timely file its LSS projected data by October 1 of each year, that company will not be eligible to receive LSS pursuant to the average schedule LSS formula in the subsequent calendar year, absent a waiver from the Commission. Accordingly, in order to receive LSS in 2004, Smithville was required by USAC to submit three specific data items (access lines, exchanges, and access minutes) for inclusion in the

³ USAC's web page regarding LSS (www.universalservice.org/hc/components/lss.asp) states that average schedule companies serving fewer than 50,000 lines must submit Form LSSa in order to qualify for local switching support. While Smithville does not question USAC's need for this information, there does not appear to be any specific rule that establishes this requirement. The annual October 1 data submission requirement arises under Section 54.301(b) of the Commission's rules. The Section 54.301(b) rules apply explicitly to cost study companies that submit accounting and other cost information as set forth in the rules. USAC requires average schedule companies also to submit projected average schedule input data in parallel with the cost study process even though neither Section 54.301(b) nor Section 54.301(f) regarding the calculation of LSS for average schedule companies include any explicit projected data submission requirement for average schedule companies. Finally, the instructions that USAC provides on its web site to average schedule carriers for completion of the Form LSSa references only the rules related to cost study companies. Accordingly, if no rule waiver is required, it may only be necessary for the Bureau to direct USAC to renew Smithville's LSS participation. Smithville has already submitted the projected information to USAC.

⁴ See 47 C.F.R. § 54.301(b)-(d).

⁵ 47 C.F.R. § 54.301(f)(1)

formula calculation. For the reasons described below, Smithville did not submit this projected data to USAC until February 10, 2004.⁶

The President of Smithville, Mr. William H. Earles, died on September 8, 2003. Until that time, Mr. Earles was the primary contact for correspondence with the National Exchange Carrier Association ("NECA") and USAC.⁷ The weeks following the death of Mr. Earles were very difficult and disruptive for Smithville. During the period following Mr. Earles death, incoming correspondence, current project files and job responsibilities were being allocated to appropriate personnel as soon as practicable. Understandably, a number of projects stalled for a period of time until the new management team could absorb the personal and professional impact of Mr. Earles death. Correspondence from NECA regarding changes in the LSS average schedule formulas, as well as notification reminders from USAC regarding the October 1, 2003 projected data submission requirement, were not located by the new management until early in February 2004 following Smithville's inquiry regarding monthly LSS settlements processed through NECA.

The Presidency of Smithville was assumed by Ms. Darby A. McCarty, who previously served

⁶ Smithville did timely file with the State of Indiana on July 11, 2003, and the State filed with the Commission and USAC on September 18, 2003, prior to October 1, 2003, its state certification for HCL, LSS, and LTS. The USAC web site page titled "General High Cost Filing Requirements" (www.universalservice.org/hc/process/filingreq.asp) lists the annual state certification requirement as the only high cost filing requirement for October of each year and does not list a filing requirement for average schedule companies to submit the projected information that is the subject of this waiver request.

⁷ Much of the reporting of data, and subsequent dollar disbursements for the various universal service support components, including LSS, are coordinated through NECA with USAC. Consequently, NECA is involved in these processes with USAC. However, Smithville does not participate in the traffic sensitive pool administered by NECA, and Smithville is an average schedule company. Smithville files its own interstate traffic sensitive access service tariff based on the average schedule settlements that the formulas would yield for Smithville.

as Senior Vice President of Smithville. While she assumed the title of Presidency in September 2003, she did not fully transition from her previous duties which focused primarily on customer service and data processing until December 2003. She did not relocate to the President's physical office until that time.

Two additional personnel issues contributed to the filing omission and Smithville's failure to recognize the error until February 2004. For approximately 10 years prior to June 30, 2003, Mr. Ronald Sherwood served as Controller as Smithville. In that role he supervised the revenue and regulatory accounting function. Mr. Sherwood left on June 30, 2003, and was replaced by Ms. Britt Grannan who did not have previous regulatory reporting experience and was unaware of any pending filing deadlines.

Regulatory filings were, and remain, the responsibility of Mr. Jon Appleby, regulatory accountant. Mr. Appleby did not receive correspondence regarding the October 1 projected data submission filing that had been directed to Mr. Earles, and consequently was unaware of the filing deadline. Mr. Appleby also was away from his job for a substantial portion of November and December 2003 with an extended illness thereby contributing to Smithville's delay, until February 2004, in identifying the filing oversight. On February 10, 2004, in reviewing the disbursement forms prepared by NECA, Mr. Appleby discovered that LSS amounts had been omitted. The Smithville management immediately contacted its regional NECA office to inquire about the omission, was told that Smithville was not listed as being eligible for LSS dollar disbursements for 2004, and was informed that questions regarding eligibility for LSS were, as an initial matter, a USAC responsibility. Upon further investigation by the Smithville management on February 10, 2004, an undated communication from USAC (presumably sent prior to the October 1, 2003 date) describing the filing of the 2004

projected data used to calculate LSS was located in the office of the President. It was at this time that the new management at Smithville became aware of the average schedule company October 1, 2003 filing date. After a further search of documents, the Smithville management concluded that the projected data filing due on October 1, 2003 had most likely not been submitted.

Mr. Appleby contacted USAC immediately on February 10, 2004, and asked if the projected data filing could be made at that time. USAC invited Smithville to submit the data, and Smithville faxed the data to USAC on February 10, 2004. However, USAC explained to Smithville that eligibility in 2004 for LSS would, nevertheless, be dependent on a waiver from the Commission.

As a family held corporation, the death of the principal owner and the management changes that took place over the last year at the company gave rise to substantial turmoil which lead to the oversight and inadvertent failure to submit the projected data to USAC on October 1, 2003. Nevertheless, on the very first day that the error was discovered, Smithville did submit the projected data to USAC.

II. Basis for Relief.

Pursuant to Section 1.3 of the Commission's rules, the Commission may grant a waiver of the application of any of its rules for "good cause shown."⁸ As noted by the Court of Appeals for the D.C.

⁸ Smithville notes that for wireless carriers, Section 1.925(b)(3) of the Commission's rules provides more specific waiver criteria including a showing that: (i) The underlying purpose of the rules would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. See 47 C.F.R. § 1.925(b). As explained herein, the facts and circumstances for Smithville are consistent with these waiver criteria and weigh in favor of grant of the request.

Circuit, agency rules are generally presumed valid.⁹ However, the Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ Waiver of the Commission's rules is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.

Smithville respectfully submits that all of these circumstances described above weigh in favor of the grant of a waiver. Strict application of the October 1, 2003 submission requirement date would be contrary to the public interest. Allowing Smithville to receive LSS during 2004, now that it has filed the necessary data, will not cause any harm or burden for any other party.

The underlying purpose of the LSS universal service support program is to provide cost recovery to small LECs for the costs of their switching investment and expenses. As such, LSS has been a substantial portion of Smithville's recovery of its switching costs for many years.¹² The purpose of LSS is to provide support to companies with smaller switches and consequently relatively higher switching costs so that companies such as Smithville do not have to recover these relatively higher costs through intrastate, basic rates. The availability of LSS thereby avoids potentially higher basic rates that

⁹ See *WAIT Radio v. FCC*, 418 F.2d 1164, 1166 (D.C. Cir. 1990, cert. denied, 409 U.S. 1027 (1972)) ("*WAIT Radio*").

¹⁰ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*").

¹¹ *Wait Radio* at 1159; and *Northeast Cellular* at 1166.

¹² Smithville estimates that its monthly LSS should be approximately \$54,000. For its estimated 32,600 access lines, LSS should provide \$1.66 per month for each access line.

would be contrary to the established universal service principles of affordability and comparability. These purposes would be frustrated were Smithville not to receive the LSS for 2004. Smithville's overall cost recovery would be thrown into disarray. Smithville's overall ratemaking result would have to be adjusted and/or some of its plans for capital expenditures and network improvements would have to be curtailed were LSS disbursements not available to the company. These results are inconsistent with the principles of universal service which support the deployment of modern networks and the availability of advanced services in rural areas as those served by Smithville. Therefore, a grant of the waiver will serve the same public interest objectives as the overall universal service plan was designed to address. And without LSS support, those purposes will be frustrated in a manner not consistent with the public interest.

The unexpected death of Smithville's President and the subsequent transition to a new management team presents unique and unusual factual circumstances relevant to any strict application of the reporting date rule. Strict application would deny Smithville of LSS cost recovery for 2004, and would subject Smithville to burdens associated with that cost recovery denial.

Moreover, grant of the waiver request can be easily accommodated by USAC, without burden to any other carrier, within the already existing universal service process. Smithville had filed its average schedule data in the immediately previous time period, and Smithville had been a recipient of LSS from its beginning. There would be no reason to expect that a local exchange carrier serving approximately 32,600 access lines would jump to over 50,000 access lines from one period to the next. Thus, USAC had at least some level of notice that the omission of what had been a constant stream of data and LSS participation was most likely a simple error.

The LSS process already utilizes a "true-up adjustment" process that corrects the results of

projected data from eligible LECs with those carriers' submission of actual LSS amounts at a later point in time.¹³ LSS true-up adjustments take place as much as 15 months after the end of the calendar year for which actual data is submitted.¹⁴ USAC incorporates the results of the true-up process into its recalculations of total universal service fund needs in the calculation of the universal service contribution factor. As such, Smithville's data and LSS disbursement, upon expedited action by the Commission, can be included and "trued-up" through the already established process.¹⁵

III. Request for Expedited Action

Unless and until the Commission grants Smithville's waiver request, it will be forced to forego the LSS cost recovery revenues. As stated above, this cost recovery support is needed and used by Smithville to support its ongoing costs and capital improvements to upgrade its network and to provide advanced services. Smithville has already submitted the projected data to USAC, and it appears that USAC is fully capable of incorporating this data and proceeding to distribute LSS to Smithville as soon as USAC has notice that the Commission has granted the requested waiver relief. Moreover, expedited action will allow USAC to reflect this correction in the overall universal service plan as soon as possible.

¹³ See 47 C.F.R. § 54.301(e).

¹⁴ 47 C.F.R. § 54.301(e)(2)(iv).

¹⁵ If the waiver can be granted and the correction can be made on an expedited basis, the essentially negligible impact on the quarterly contribution factors can be reflected in the next USAC calculation. It is not clear to Smithville whether USAC's projections that led to its calculation of the first quarter 2004 contribution factor may have actually included LSS expectations for Smithville, since Smithville has been a participant for LSS for a considerable amount of time, and the methods that USAC utilizes may depend on various statistical projections. In any event, the true-up process already recognizes corrections and any correction to recognize Smithville's LSS amounts would represent a very small inconsequential percentage of the overall fund and expected true-up activity.

Smithville respectfully submits that the facts with respect to the precipitating events, the policy considerations associated with the grant of the waiver request, and the implications of granting the waiver are clear and straightforward. Upon grant of the waiver, USAC can simply adjust the LSS disbursements to correct the past amounts using the ongoing true-up process. Accordingly, Smithville requests expedited action by the Commission so that USAC can be properly notified as soon as practical so that future settlements and USAC's calculations can be corrected as soon as possible. In the absence of expedited action, Smithville may be forced to pursue ratemaking changes inconsistent with universal service objectives and curtail, delay, or scale back planned network upgrades and other capital projects. This result would impose needless hardship on Smithville to pursue alternative cost recovery options and would work to penalize unnecessarily its end users that would be denied the benefits the LSS revenue would have supported.

IV. Conclusion

For the reasons stated herein, Smithville submits that good cause has been shown for the grant of the requested waiver as set forth herein. Grant of the waiver will allow Smithville to receive LSS disbursements for the year 2004 consistent with the statutory goal of preserving and advancing universal service for the rural customers served by Smithville. This result will be consistent with the public interest. Expedited action is requested to minimize the time that Smithville will be prevented from receiving the LSS cost recovery support that it expected to receive. Without the LSS support, it will be the customers of Smithville that will be burdened with potential rate changes, curtailed upgrades, or delays in the availability of advanced services. With the grant of the waiver, Smithville will merely receive the LSS that was intended under the universal service plan policies, and the grant of the waiver will not adversely affect any other carrier or customer.

Respectfully submitted,

SMITHVILLE TELEPHONE COMPANY, INC.

By: 

Kent N. Rodgers
Chief Financial Officer/Treasurer
Smithville Telephone Company, Inc.

1600 W. Temperance Street
PO Box 728
Ellettsville, Indiana 47429
(812) 876-2211

February 26, 2004

DECLARATION

I, Kent N. Rodgers, Chief Financial Officer of Smithville Telephone Company, Inc. ("Smithville"), do hereby declare under penalties of perjury that I have read the foregoing "Petition for Waiver -- Expedited Action Requested," and the information contained therein that pertains to Smithville is true and accurate to the best of my knowledge, information and belief.

Date: 2-25-04


Kent N. Rodgers